



COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 4

RIN 3038-AE47

Commodity Pool Operator Annual Report

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is proposing to amend certain of its regulations applicable to the Annual Report that each person registered or required to be registered as a commodity pool operator (CPO) must distribute for each commodity pool that it operates (Proposal). Specifically, the Proposal addresses the use of additional alternative generally accepted accounting principles, standards or practices, and the Annual Report audit requirement where the first fiscal year of a pool consists of a period of three months or less from the date of formation of the pool.

DATES: Comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments, identified by RIN 3038-AE47 and “Commodity Pool Operator Annual Report,” by any of the following methods:

- CFTC website: <http://comments.cftc.gov>. Follow the instructions for submitting comments through the Comments Online process on the website.

- Mail: Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

- Hand Delivery/Courier: Same as Mail, above.
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Please submit your comments using only one of these methods.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <http://www.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that may be exempt from disclosure under the Freedom of Information Act (FOIA), a petition for confidential treatment of the exempt information may be submitted according to the procedures established in Commission Regulation 145.9.¹

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from www.cftc.gov that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the FOIA.

¹ 17 CFR 145.9 (2016). The Commission's regulations are found at 17 CFR Ch. I (2016). They are accessible through the Commission's website.

FOR FURTHER INFORMATION CONTACT: Christopher W. Cummings, Special Counsel, 202-418-5445, ccummings@cftc.gov or Barbara S. Gold, Associate Director, 202-418-5441, bgold@cftc.gov, Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

A. Part 4 of the Commission's Regulations

Part 4 of the Commission's regulations governs the operations and activities of CPOs.² It requires each CPO registered or required to be registered with the Commission: to deliver to each participant in its commodity pool a Disclosure Document for the pool containing specified information (Regulations 4.21, 4.24, 4.25 and 4.26); to distribute to each participant periodic unaudited Account Statements for the pool (Regulation 4.22(a)) and an audited Annual Report for the pool (Regulation 4.22(c)); and to make and keep specified books and records (Regulation 4.23). Additionally, Part 4 prohibits certain activities on the part of all CPOs (Regulations 4.20 and 4.41) and provides for various CPO definitional exclusions (Regulation 4.5), CPO registration exemptions (Regulation 4.13), and compliance exemptions from otherwise applicable CPO requirements (Regulations 4.7, 4.12(b), and 4.12(c)).³

² Section 1a(11) of the Commodity Exchange Act (Act or CEA), 7 U.S.C. 1a(11) (2012), defines the term "commodity pool operator" and CEA Section 4m(1) generally requires each person who comes within the CPO definition to register as a CPO with the Commission. The Act is found at 7 U.S.C. et seq. (2012). It similarly is accessible through the Commission's website.

³ Part 4 contains many similar provisions applicable to commodity trading advisors (CTAs). The Proposal does not pertain to CTAs, however, because CTAs do not operate commodity pools (CPOs do) and therefore there is no Annual Report requirement applicable to them.

Over the past years, and pursuant to authority delegated to it by Regulation 140.93, Commission staff has provided exemptive relief from specific Part 4 requirements on a case-by-case basis.⁴ By this Federal Register release, the Commission is proposing to codify certain of these exemptions as applicable to the Annual Report.

B. Regulation 4.22: The Annual Report Requirement

Regulation 4.22 requires, in general, that each CPO registered or required to be registered with the Commission to distribute to each participant in each commodity pool it operates, and to submit to the National Futures Association (NFA),⁵ an Annual Report for the pool within 90 calendar days after the end of the pool's fiscal year.⁶ The regulation: specifies the financial statements and related information that the Annual Report must contain (Regulation 4.22(c)); requires that the financial statements must be presented and computed in accordance with generally accepted accounting principles consistently applied (U.S. GAAP) and that they must be audited by an independent public accountant (Regulation 4.22(d)); includes specific provisions applicable to the Statement of Operations (Regulation 4.22(e)); provides for an extension of an otherwise applicable

⁴ These were issued by the Commission's Division of Swap Dealer and Intermediary Oversight ("DSIO") and its predecessors, the Division of Clearing and Intermediary Oversight and the Division of Trading and Markets.

Regulation 140.93 currently delegates to the Director of DSIO "all functions reserved to the Commission" in Regulation 4.12(a) – which provides that the Commission "may exempt any person or any class or classes of persons from any provision of this Part 4 if it finds that the exemption is not contrary to the public interest and the purposes of the provisions from which the exemption is sought" and, further, that the Commission "may grant the exemption subject to such terms and conditions as it may find appropriate."

⁵ NFA is registered as a futures association in accordance with CEA Section 17. It is the only futures association registered as such.

⁶ Regulation 4.22(c) further requires the CPO to submit to NFA certain key financial balances from the Annual Report.

As noted above, Regulation 4.22 also requires each CPO registered or required to be registered to distribute to each participant in each commodity pool it operates an unaudited periodic Account Statement for the pool. Specifically, Regulation 4.22(a) prescribes the financial information the Account Statement must contain, and Regulation 4.22(b) prescribes the frequency of distribution of the Account Statement (quarterly or monthly, depending on the size of the pool).

distribution deadline (Regulation 4.22(f)); governs fiscal year election (Regulation 4.22(g)); mandates that the Annual Report be accompanied by a prescribed oath or affirmation of the CPO (Regulation 4.22(h)); and permits electronic distribution of the Annual Report to a participant if the participant consents to that method of distribution (Regulation 4.22(i)).

In connection with the adoption of the Annual Report requirement, the Commission explained that the purpose of the Annual Report is to provide pool participants “with the information necessary to assess the overall trading performance and financial condition of the pool” and that the purpose of the requirement that the Annual Report be audited is to “promote greater accuracy in financial statements and provide an independent review of the pool’s activities.”⁷ The Commission believes that the amendments it is proposing today to Regulation 4.22 are consistent with these purposes.

II. The Proposal

A. Proposed Amendment to Regulation 4.22(d)(2): Use of additional alternative generally accepted accounting principles, practices or standards

Regulation 4.22(d) specifies how the financial statements in the Annual Report must be presented and computed. Currently, paragraph (d)(1) of the regulation requires that these financial statements must be presented and computed in accordance with generally accepted accounting principles consistently applied, and paragraph (d)(2) of the regulation makes available an exception to this requirement by permitting the use of International Financial Reporting Standards (IFRS) where certain criteria are met. A

⁷ 44 FR 1918, 1922 (Jan. 8, 1979).

CPO seeking to avail itself of Regulation 4.22(d)(2) must claim the relief by filing a signed notice with NFA representing that: (1) the pool is organized under the laws of a foreign jurisdiction; (2) the Annual Report will include a schedule of investments (condensed unless a full schedule is required under IFRS); (3) the use of IFRS to prepare the Annual Report is not inconsistent with representations set forth in the pool's disclosures to participants; (4) any special allocations of ownership equity will be reported in accordance with Regulation 4.22(e); and (5) in the event that IFRS requires consolidated financial statements for the pool (e.g., in a master-feeder fund structure), all applicable disclosures required by U.S. GAAP will be provided.

At the time that the Commission proposed to amend Regulation 4.22(d) to permit the use of IFRS, it acknowledged that its staff had also been granting relief on a case-by-case basis to allow CPOs operating commodity pools located outside the United States to use accounting standards established in certain other jurisdictions, and it invited such CPOs if they otherwise met the criteria of Regulation 4.22(d)(2) to continue requesting such relief from staff on a case-by-case basis.⁸ The Commission now believes that staff's experience with providing relief to use the accounting principles, standards or practices followed in the U.K., Ireland, Luxembourg, and Canada warrants extending relief comparable to that which Regulation 4.22(d) provides for the use of IFRS. Accordingly, the Commission is proposing to amend Regulation 4.22(d)(2) so that it would also permit the use of generally accepted accounting principles, standards or practices followed in the

⁸ See 74 FR 8220, 8224 (Feb. 24, 2009). Subsequent to the Commission amending Regulation 4.22(d) to permit the use of IFRS, Commission staff has granted relief to use accounting principles, standards or practices established in the United Kingdom (U.K.), Ireland, Luxembourg and Canada. See, e.g., CFTC Staff Letter 09-42 (U.K.) and CFTC Staff Letters 15-57 and 14-10 (Luxembourg). Staff Letters are accessible through the Commission's website.

U.K., Ireland, Luxembourg, or Canada.⁹ A CPO desiring to avail itself of any of these additional alternative accounting principles, standards or practices would be required to claim this relief by filing a notice with NFA containing the same representations required for CPOs desiring to use IFRS.

B. Proposed Amendment to Regulation 4.22(g)(2): Audit requirement where the first fiscal year is a period of three months or less from the date of formation of the pool

As stated above, Regulation 4.22(g) governs the election of a fiscal year by a CPO. It: permits the CPO to initially elect any fiscal year for its pool, provided that the pool's first fiscal year does not end more than one year after the pool's formation;¹⁰ requires notice to participants and NFA if the CPO elects other than a calendar year for the pool's fiscal year; and requires notice to participants and NFA prior to changing the previously-elected fiscal year (paragraphs (g)(1), (g)(2), and (g)(3), respectively).

Because Regulation 4.22(c) requires that an Annual Report be distributed to pool participants and submitted to NFA within 90 calendar days after the end of the pool's fiscal year, and because Regulation 4.22(d) requires that the Annual Report be audited by an independent public accountant, the CPO of a pool that was formed, for example, two months before the end of the pool's first fiscal year would be required to distribute and submit an audited Annual Report for that two-month fiscal year, regardless of particular circumstances – for example, where there are a limited number of participants in the pool

⁹ In order to clarify the existing text, the Commission is also proposing to specify in Regulation 4.22(d)(1) that the regulatory norm is that “[t]he financial statements in the Annual Report must be presented and computed in accordance with United States generally accepted accounting principles” (Emphasis supplied.)

¹⁰ Regulation 4.22(g)(1) provides that for these purposes, a pool is deemed to be formed as of the date the pool operator first receives funds, securities or other property for the purchase of an interest in the pool.

and a limited amount of funds have been contributed to the pool. In those circumstances, the cost of an audit for the short period of time of the pool's operation would likely be unduly burdensome relative to the size of the pool.¹¹ Over the past years, in circumstances such as the foregoing, Commission staff has issued exemptions from the requirement that a separate audited Annual Report be distributed and submitted for the pool's first fiscal year.¹²

The Commission is now proposing to amend Regulation 4.22(g)(2) to provide for an exemption from the audit requirement applicable to the Annual Report for a pool's first fiscal year when the period from formation of the pool to the end of the pool's first fiscal year is a short period of time.¹³ The existing text of the regulation would be found in new paragraph (g)(2)(i) of Regulation 4.22 and the proposed exemption would be contained in new paragraph (g)(2)(ii) of Regulation 4.22. As discussed below, the proposed exemption would specify the criteria for eligibility and the procedure to be followed to claim the exemption. It would also be subject to compliance with the condition that the next Annual Report the CPO distributes and submits is audited and covers the time period from the formation of the pool to the end of the pool's first 12-month fiscal year. Under the Proposal, a CPO could claim this relief where: (1) the time period from the formation of the pool to the end of the pool's first fiscal year is three months or less; (2) from the formation of the pool to the end of the pool's first fiscal year the pool had no more than fifteen participants; and (3) from the formation of the pool to

¹¹ See CFTC Staff Letter 01-13.

¹² See, e.g., CFTC Staff Letters 16-50 and 15-10.

¹³ In addition to the substantive changes described below, because the Proposal would add another exception to the general Annual Report audit requirement, the introductory text of Regulation 4.22(d)(1) would be revised to read "Subject to the provisions of paragraphs (d)(2) and (g)(2) of this section."

the end of the pool's first fiscal year the total gross capital contributions received by the CPO for units of participation in the pool did not exceed \$1,500,000. The Commission is proposing to use the formation of the pool as the starting point of the stub period, and thus the point for determining eligibility for relief, to ensure that all CPOs and their pool participants are on a level playing field with respect to both what information the Annual Report must contain for the pool's first fiscal year, and the requirement that such information be audited.

For the purpose of determining eligibility for relief, the following persons and their capital contributions would not be counted: (1) the pool's CPO, its CTA, and any of their principals; (2) a child, sibling, or parent of the participants described in category (1); (3) the spouse of any of the participants described in category (1) or (2); (4) any relative of one of the participants described in categories (1) through (3); and (5) an entity that is wholly-owned by one or more of the participants described in categories (1) through (4). In this regard, the Commission notes that the CPO could count a non-natural person as a single participant. But if that non-natural person was also a commodity pool, its CPO would have to separately qualify for relief under (proposed) Regulation 4.22(g)(2)(ii) in order for that (second) CPO to claim the relief. The 15-participant limit and the categories of participants and respective contributions that need not be counted are taken from Regulation 4.13(a)(2), which makes available a CPO registration exemption for the operator of a family, club or small pool.¹⁴ The Commission believes that structuring the

¹⁴ Briefly stated, Regulation 4.13(a)(2) provides that a person is not required to register as a CPO if: (1) none of the commodity pools operated by it has more than 15 participants; and (2) the total gross capital contributions it receives from participants in all of its pools does not in the aggregate exceed \$400,000. The regulation further provides that for the purpose of determining eligibility for the exemption, the person may exclude, among others, the following participants and their contributions: the pool's CPO, the pool's CTA, and the principals thereof.

proposed exemption in this way would avoid unnecessary burdens while maintaining customer protections.

To avail itself of the relief, a CPO would be required to obtain, prior to the date on which the Annual Report for the pool's first fiscal year is due, a specified written waiver of the right to receive an audited Annual Report for that fiscal year from each person who has been a participant in the pool during the first fiscal year. The CPO would be required to retain the waiver in accordance with Regulation 4.23. Then, on or before the date on which the Annual Report for the pool's first fiscal year is due, the CPO would be required to file a notice of claim with NFA, along with a certification that the CPO had received the specified written waiver from each of the pool's participants. This notice would be based on the notice required to claim relief to present and compute an Annual Report in accordance with IFRS, under existing Regulation 4.22(d)(2)(ii). Finally, the CPO would be required to include on the cover of each Annual Report for which relief had been claimed under Regulation 4.22(g)(2) a prescribed statement that provided information on whether the Annual Report was unaudited or audited and the period of time that the Annual Report covered.

C. Proposed Amendment to Regulation 4.22(c)(7): Unavailability of audit requirement exception

Regulation 4.22(c)(7) makes available various exceptions to Annual Report requirements to the CPO of a pool that ceases operation prior to, or at the end of, the pool's fiscal year. In particular, paragraph (c)(7)(iii) provides that a report distributed and submitted pursuant to Regulation 4.22(c)(7) is not required to be audited if the CPO

The Commission explained that it had adopted this registration exemption "because the costs of compliance with the Part 4 rules outweighs the benefits to be gained from regulating family, club and small pools." 44 FR 1918, 1919 (Jan. 8, 1979).

complies with the conditions stated in the regulation. To ensure that an audit is conducted at least once in the life of a commodity pool, the Commission is proposing an amendment to paragraph (c)(7)(iii) of Regulation 4.22 that would make the audit requirement relief under that paragraph unavailable where a CPO has not previously distributed an audited Annual Report to pool participants or submitted the audited Annual Report to NFA – e.g., where the CPO has claimed relief pursuant to (proposed) Regulation 4.22(g)(2) and the pool has ceased operations before the end of its first twelve-month fiscal year.

III. Request for Comments

The Commission requests comment generally on all aspects of the Proposal. In particular, the Commission requests comment on the following:

1. Is there any information required to be included in an Annual Report prepared in accordance with U.S. GAAP that would not be included under generally accepted accounting principles, standards or practices in the U.K., Ireland, Luxembourg or Canada? If so, what is that information and should the Commission require that such information be separately presented in an Annual Report prepared under any such alternative accounting principles, standards or practices? Are there, for example, any specific line items where treatment under one of the referenced sets of accounting principles, standards or practices (or under IFRS) differs from the treatment under U.S. GAAP and for which reconciliation to U.S. GAAP should be required?

2. Should the Commission adopt a provision whereby a CPO could claim relief from the Annual Report audit requirement for a pool in which the only participants were the CPO and one or more other “insiders” (i.e., the persons identified in proposed

Regulation 4.22(g)(2)(ii)), regardless of the amount of capital contributed to the pool?

What other criteria, if any, should be required?

3. Are there any other issues relevant to the Proposal that the Commission should consider?

IV. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires Federal agencies to consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, to provide a regulatory flexibility analysis regarding the economic impact on those entities. The Commission previously has established certain definitions of “small entities” to be used by the Commission in evaluating the impact of its rules on such entities in accordance with the requirements of the RFA.¹⁵ With respect to CPOs, the Commission previously has determined that a CPO is a small entity for the purpose of the RFA if it meets the criteria for an exemption from registration under Regulation 4.13(a)(2).¹⁶ Thus, because the Proposal applies to persons registered or required to be registered as a CPO with the Commission, the RFA is not applicable to it.

Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 6065(b) that the Proposal, if adopted, will not have a significant economic impact on a substantial number of small entities.

¹⁵ See, e.g., 47 FR 18618 (Apr. 30, 1982).

¹⁶ Id. at 18619-20.

B. Paperwork Reduction Act

1. Overview

The Paperwork Reduction Act of 1995 (PRA)¹⁷ imposes certain requirements on Federal agencies (including the Commission) in connection with conducting or sponsoring any collection of information as defined by the PRA. If adopted, the Proposal would result in a collection of information within the meaning of the PRA, as discussed below. The Commission therefore is submitting the Proposal to the Office of Management and Budget (OMB) for review.

The Proposal contains collections of information for which the Commission has previously received control numbers from OMB. The title for these collections of information is “Registration under the Commodity Exchange Act, OMB control number 3038-0005.”

The responses to these collections of information are mandatory. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number issued by OMB.

The collections of information in this Proposal would provide to eligible CPOs: (1) an optional alternative to complying with the requirement to compute and present the financial statements in a pool Annual Report in accordance with U.S. GAAP (or in accordance with IFRS); and (2) an optional alternative to complying with the audit requirement for the Annual Report for a pool’s first fiscal year, all as described above. In each case, eligible persons would have the option to elect the alternative, but no obligation to do so. For this reason, except to the extent that the Commission is

¹⁷ 44 U.S.C. 3501 et seq.

amending the subject OMB control number for PRA purposes to reflect these alternatives, the Proposal is not expected to impose any new burdens on CPOs. Rather, to the extent that the Proposal provides alternative means to comply with existing requirements, and an alternative is elected by a CPO, it is reasonable for the Commission to infer that the alternative is less burdensome to such CPO.

2. Revisions to Collection 3038-0005

Collection 3038-0005 is currently in force with its control number having been provided by OMB. As discussed above, the Proposal would add a new exemption to permit a CPO to use accounting principles, standards or practices established in the U.K., Ireland, Luxembourg or Canada. In order to qualify for this exemption, an eligible CPO would be required to take the steps stated in the Proposal, including providing appropriate notification in the pool's Disclosure Document and submitting the required notice to NFA. The Proposal would further add a new exemption to permit a CPO to distribute and submit an unaudited Annual Report for its pool's first (partial) fiscal year and an audited Annual Report for the combined period covered by the pool's first (partial) fiscal year plus the pool's first twelve-month fiscal year. In order to qualify for this exemption, an eligible CPO would be required to take the steps stated in the Proposal, including obtaining waivers from pool participants, submitting the required notice and certification to NFA, providing appropriate notification in the Annual Report, and maintaining the waivers as records. Requiring such actions on the part of an eligible CPO would result in revisions to collection 3038-0005. Therefore, the Commission proposes to revise collection 3038-0005.

Commission staff has received approximately 8 requests in each of 2014 and 2015 from CPOs asking for relief from the requirement to prepare the pool's financial statements in accordance with U.S. GAAP. If the same relief can be claimed with a notice filing (without submitting a request for an individual exemptive letter) additional CPOs are likely to apply. Therefore, the Commission estimates that CPOs will submit 10 notices per year to take advantage of the alternative provided in this Proposal. Similarly, because staff has received approximately 10 requests in each of 2014 and 2015 from CPOs asking for relief from the requirement to distribute and submit an audited Annual Report for a pool's first fiscal year, the Commission estimates that CPOs will submit 12 notices per year to take advantage of the alternative provided in this Proposal.

Collection 3038-0005 relates to collections of information from CPOs and other Commission registrants. Based on the above, the estimated additional hour burden for collection 3038-0005 of 34 hours is calculated as follows:

a. Estimated Additional Hour Burden for Collection 3038-0005 due to Proposed Alternative to Complying with Requirement to Present and Compute a Pool's Financial Statements according to U.S. GAAP.

Anticipated number of claimants: 10.

Frequency of collection: As needed (initial filing and subsequent compliance).

Estimated annual responses per claimant: 1.

Estimated aggregate number of annual responses: 10.

Estimated annual hour burden per registrant: 1 hr.

Estimated aggregate annual hour burden: 10 (10 claimants x 1 hour per claimant).

b. Estimated Additional Hour Burden for Collection 3038-0005 due to Proposed Alternative to Complying with Requirement to Distribute and Submit an Audited Annual Report for a Pool's First Fiscal Year.

Number of claimants: 12.

Frequency of collection: As needed (initial filing and subsequent compliance and recordkeeping).

Estimated annual responses per claimant: 1.

Estimated aggregate number of annual responses: 12.

Estimated annual hour burden per claimant: 2.¹⁸

Estimated aggregate annual hour burden: 24 (12 claimants x 2 hours per claimant).

3. Information Collection Comments

The Commission invites the public and other Federal agencies to comment on any aspect of the proposed information collection requirements discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

¹⁸ This figure for annual hour burden per claimant includes one hour for reporting and one hour for recordkeeping.

Comments may be submitted directly to the Office of Information and Regulatory Affairs, by fax at (202) 395-6566, or by email at OIRAsubmissions@omb.eop.gov. Please provide the Commission with a copy of submitted comments so that all comments can be summarized and addressed in the preamble of the adopting Federal Register release. Refer to the **ADDRESSES** section of this notice of proposed rulemaking for instructions on submitting comments to the Commission. A copy of the supporting statements for the collection of information discussed above may be obtained by visiting <http://RegInfo.gov>. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the Federal Register. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

C. Cost-Benefit Considerations

Section 15(a) of the Act¹⁹ requires the Commission to consider the costs and benefits of its actions before promulgating a regulation or issuing certain orders under the Act. Section 15(a) further requires the Commission to evaluate the costs and benefits of any such proposed action in light of five specified areas of consideration, discussed below. The baseline against which the Proposal is compared is the status quo, i.e., current Regulations 4.22(c)(7), 4.22(d)(2) and 4.22(g).

1. Summary of the Proposal

The Proposal would require a CPO to make a notice filing in order to be able either to use alternative accounting principles, standards or practices other than U.S. GAAP or IFRS, or to distribute and submit an unaudited Annual Report for its pool's first

¹⁹ 7 U.S.C. 19(a).

(partial-year) fiscal year and an audited Annual Report that combines information for the pool's first (partial-year) fiscal year with information for the following, first twelve-month fiscal year. In either case, the required filing is patterned after that required by existing Regulation 4.22(d)(2) that a CPO must submit in order to use IFRS. Thus, the notice would contain such information as the CPO's name, address and telephone number, the NFA identification numbers of the CPO and the pool, and representations that the CPO complies with the requisite criteria. Additionally, in the second case, the notice would include a certification that the CPO had obtained written waivers from pool participants of their right to receive an audited Annual Report for the pool's first (partial-year) fiscal year. Finally, the Proposal makes unavailable the audit requirement exemption in Regulation 4.22(c)(7), such that the CPO of a pool that is opened and closed in the same fiscal year must distribute and submit audited financial statements.

2. Costs

The Commission believes that the differences in the costs of compliance between the Proposal and existing Regulations 4.22(d)(2) and 4.22(g) would be small because the notice filing is designed to mimic the relevant features of existing Regulation 4.22(d)(2). Nevertheless, the Commission believes that the Proposal will lower costs to CPOs relative to a case-by-case staff-issued exemption, because the Proposal is more standardized. In addition, due to the unavailability of the audit requirement exemption, there is a small cost to the CPO of a pool that is opened and closed in the same fiscal year, because the CPO would now have to distribute and submit audited financial statements for the pool.

There may also be some cost savings if the conditions of the exemption are met, because a CPO who operated a pool that met those conditions would be allowed to distribute to shareholders and submit to NFA an unaudited Annual Report for its pool's first (partial-year) fiscal year and an audited Annual Report that combines information for the pool's first (partial-year) fiscal year with information for the following, first twelve-month fiscal year. The Commission believes that the envisioned costs savings would be due to the independent public accountant only needing to conduct an audit of the pool once and only issuing one opinion on the pool's financial statements. The Commission seeks comment concerning whether or not the Proposal will reduce costs for CPOs relative to existing Regulations 4.22(d)(2) and 4.22(g).

3. Benefits

An advantage of a notice filing over a Commission staff-processed exemption is timeliness. For instance, a CPO that filed a notice under the Proposal would not have to wait for Commission staff to process a request for an individual exemption letter. There is also the benefit that pool participants would receive financial statements for the pool's first fiscal year.

The Commission believes there will be no net benefit from the Proposal as compared to existing Regulations 4.22(d)(2) and 4.22(g) with respect to financial disclosures. By codifying exemptions previously provided by Commission staff on a case-by-case basis, the Proposal would continue to assist pool participants by providing them the information necessary to assess the overall trading performance and financial condition of their pool, but with a lower overall burden to certain CPOs. The Commission believes that pool participants are knowledgeable enough to evaluate

financial statements prepared under principles, standards or practices established in the U.K., Ireland, Luxembourg or Canada, provided that the relevant accounting principles, standards or practices are properly disclosed to them. The Commission seeks public comment concerning whether or not use of the specified different systems of accounting principles, standards and practices might lead to material differences in financial statements that pool participants might not be able to understand. For example, should the Commission require CPOs to disclose in the footnotes to the pool's financial statements when material difference exist between U.S. GAAP and alternative accounting principles, standards or practices? Additionally, the Commission believes that there will be minimal loss in the level of confidence of pool participants in their pool's financial statements, because an independent public accountant will still have to issue an opinion on an audited Annual Report that combines information for the pool's first (partial-year) fiscal year with information for the following, first twelve-month fiscal year. The Commission seeks public comment concerning whether this belief is correct or not.

4. Section 15(a) Factors

As noted above, Section 15(a) of the Commodity Exchange Act (CEA or Act) requires the Commission to consider the costs and benefits of its actions before promulgating a regulation or issuing certain orders. As also noted above, CEA Section 15(a) further specifies that the Commission shall evaluate the costs and benefits of its actions in light of five specific concerns. Those concerns relate to: (i) protection of market participants and the public; (ii) efficiency, competitiveness, and financial integrity of futures markets; (iii) price discovery; (iv) sound risk management practices; and (v) other public interest considerations.

i. Protection of market participants and the public

The Commission believes that the Proposal will provide the same level of protection to commodity pool participants through the disclosure of financial statements as do existing Regulations 4.22(d)(2) and 4.22(g). The Commission believes that pool participants are knowledgeable enough to evaluate financial statements prepared under accounting principles, standards and practices established in the U.K., Ireland, Luxembourg or Canada, provided that the relevant accounting principles, standards and practices are properly disclosed to them. By codifying exemptions previously provided by Commission staff on a case-by-case basis, the Proposal would continue to assist pool participants by providing them the information necessary to assess the overall trading performance and financial condition of their pool, but with a lower overall burden to certain CPOs. Additionally, the Commission believes that there will be minimal loss in the level of confidence of pool participants in their pool's financial statements, because an independent public accountant will still have to issue an opinion on the financial statements included in an Annual Report that combines information for the pool's first (partial-year) fiscal year with information for the following, first twelve-month fiscal year.

ii. Efficiency, competitiveness, and financial integrity of markets

The Commission has not identified any impact that the Proposal would have on efficiency, competitiveness, and financial integrity of markets.

iii. Price discovery

The Commission has not identified any impact that the Proposal would have on price discovery.

iv. Sound risk management practices

The Commission has not identified any impact that the Proposal would have on sound risk management practices.

v. Other public interest considerations

The Commission has not identified any impact on any other public interest considerations that the Proposal would have, but seeks public comment on any public interest the Commission should consider in this rulemaking.

5. Request for Comments

The Commission invites public comment on its cost-benefit considerations, including the Section 15(a) factors described above. Commenters are invited to submit with their comment letters any data or other information that they may have that quantifies or qualifies the costs and benefits of the Proposal.

List of Subjects in 17 CFR Part 4

Advertising, Brokers, Commodity futures, Commodity pool operators, Commodity trading advisors, Consumer protection, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR part 4 as follows:

**PART 4 – COMMODITY POOL OPERATORS AND COMMODITY TRADING
ADVISORS**

1. The authority citation for part 4 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6(c), 6b, 6c, 6l, 6m, 6n, 6o, 12a, and 23.

2. Amend § 4.22 as follows:

- a. Revise paragraphs (c)(7)(iii) and (d);
- b. Redesignate paragraph (g)(2) as paragraph (g)(2)(i); and
- c. Add paragraph (g)(2)(ii).

The revisions and addition to read as follows:

§ 4.22 Reporting to pool participants.

* * * * *

(c) * * *

(7) * * *

(iii) A report filed pursuant to paragraph (c)(7) of this section that would otherwise be required by paragraph (c) of this section is not required to be audited in accordance with paragraph (d) of this section if the commodity pool operator obtains from all participants written waivers of their rights to receive an audited Annual Report, and at the time of filing the Annual Report with the National Futures Association, certifies that it has received waivers from all participants. The commodity pool operator must maintain the waivers in accordance with § 1.31 of this chapter and must make the waivers available to the Commission or National Futures Association upon request. Notwithstanding the provisions of paragraph (g)(2)(ii) of this section, the relief made available by this paragraph (c)(7)(iii) shall not be available where the commodity pool operator has not previously distributed an audited Annual Report to pool participants and submitted an audited Annual Report to the National Futures Association.

* * * * *

(d)(1) Subject to the provisions of paragraphs (d)(2) and (g)(2) of this section, the financial statements in the Annual Report required by this section or by § 4.7(b)(3) must

be presented and computed in accordance with United States generally accepted accounting principles consistently applied and must be audited by an independent public accountant. The requirements of § 1.16(g) of this chapter shall apply with respect to the engagement of such independent public accountants, except that any related notifications to be made may be made solely to the National Futures Association, and the certification must be in accordance with § 1.16 of this chapter, except that the following requirements of that section shall not apply:

* * * * *

(2)(i) Where a commodity pool is organized in a jurisdiction other than the United States, the financial statements in the Annual Report required by this section or by § 4.7(b)(3) may be presented and computed in accordance with the generally accepted accounting principles, standards or practices followed in such other jurisdiction;

Provided, That:

(A) The other jurisdiction follows accounting principles, standards or practices set forth in paragraph (d)(2)(ii) of this section and the Annual Report presents and computes the financial statements of the pool in accordance with the applicable accounting principles, standards or practices followed by such other jurisdiction;

(B) The Annual Report includes a condensed schedule of investments, or, if required by the applicable accounting principles, standards or practices followed by such other jurisdiction, a full schedule of investments;

(C) The Annual Report reports special allocations of ownership equity in accordance with paragraph (e)(2) of this section;

(D) The Disclosure Document or offering memorandum for the pool identifies the accounting principles, standards or practices of the other jurisdiction pursuant to which the Annual Report presents and computes the financial statements of the pool; and

(E) Where the accounting principles, standards or practices of the other jurisdiction require consolidated financial statements for the pool, such as a feeder fund consolidating with its master fund, all applicable disclosures required by United States generally accepted accounting principles for the feeder fund must be presented with the reporting pool's consolidated financial statements.

(ii) For purposes of paragraph (d)(2)(i) of this section, the following alternative accounting principles, standards or practices may be employed in the preparation and computation of the financial statements in the Annual Report of the commodity pool; Provided, That any such alternative accounting principles, standards or practices so employed are those followed by the jurisdiction other than the United States in which the commodity pool is organized:

(A) International Financial Reporting Standards;

(B) Generally Accepted Accounting Practice in the United Kingdom;

(C) New Irish Generally Accepted Accounting Practice;

(D) Luxembourg Generally Accepted Accounting Principles; or

(E) Canadian Generally Accepted Accounting Principles.

(iii) To claim the relief available under this paragraph (d)(2), a commodity pool operator must file a notice with the National Futures Association within 90 calendar days after the end of the pool's first fiscal year.

(A) The notice must contain: the name, main business address, main telephone number and National Futures Association registration identification number of the commodity pool operator; the name and identification number of the commodity pool for which the pool operator is claiming relief; and the alternative accounting principles, standards or practices pursuant to which the financial statements in the Annual Report will be presented and computed;

(B) The notice must include a representation that the commodity pool operator complies with each of the conditions specified in paragraphs (d)(2)(i)(A) through (D) of this section and, if applicable, paragraph (d)(2)(i)(E) of this section; and

(C) The notice must be signed by the commodity pool operator in accordance with paragraph (h) of this section.

* * * * *

(g) * * *

(2)(i) If a commodity pool operator elects a fiscal year other than the calendar year, it must give written notice of the election to all participants and must file the notice with the National Futures Association within 90 calendar days after the date of the pool's formation. If this notice is not given, the pool operator will be deemed to have elected the calendar year as the pool's fiscal year.

(ii) If the time period from the formation of the pool to the end of the pool's first fiscal year is three months or less, the first Annual Report for the pool may be unaudited; Provided, That:

(A) Throughout the period of formation through the end of the pool's first fiscal year, the pool had no more than fifteen participants and no more than \$1,500,000 in

aggregate gross capital contributions. For the purpose of satisfying these criteria, the commodity pool operator may exclude the following persons and their contributions:

(1) The pool operator, the pool's commodity trading advisor, and any principal thereof;

(2) A child, sibling, or parent of any of these participants;

(3) The spouse of any participant specified in paragraph (g)(2)(i)(A)(1) or (2) of this section;

(4) Any relative of a participant specified in paragraph (g)(2)(i)(A)(1), (2) or (3) of this section, its spouse or a relative of its spouse, who has the same principal residence as such participant; and

(5) An entity that is wholly-owned by one or more participants specified in paragraph (g)(2)(ii)(A)(1), (2), (3) or (4) of this section; and

(B) The next Annual Report for the pool is audited and covers the time period from the formation of the pool to the end of the pool's first 12-month fiscal year.

(C) To claim the relief available under paragraph (g)(2)(ii) of this section, a commodity pool operator must:

(1) Prior to the date upon which it is required to distribute and submit an audited Annual Report for the pool's first fiscal year, obtain from each pool participant who otherwise would have been entitled to such an Annual Report a written waiver of the participant's right to receive an audited Annual Report for the pool's first fiscal year. The waiver must be signed by the pool participant and must state as follows: "[Name of participant], a participant in [Name of pool], voluntarily waives the right under CFTC Regulation 4.22(d) to receive an audited Annual Report for the fiscal year ended [end

date of the pool's first fiscal year] and will accept in lieu thereof an unaudited Annual Report covering the period [date of formation of the pool] through [end of the pool's first fiscal year] and an audited Annual Report covering the period [date of formation of the pool] through [end date of the pool's first twelve-month fiscal year]."; and

(2) On or before the date upon which it is required to distribute and submit the Annual Report for the pool's first fiscal year, file a notice with the National Futures Association, along with a certification that it has received the required written waiver from each person who has been a participant in the pool for its first fiscal year.

(i) The notice must contain: the name, main business address, main telephone number and National Futures Association registration identification number of the commodity pool operator; the name and identification number of the commodity pool for which the pool operator is claiming relief; and the dates of formation of the pool and the first fiscal year end of the pool;

(ii) The notice must include a representation that the commodity pool operator meets the criteria of paragraph (g)(2)(ii)(A) of this section and that it will comply with the condition of paragraph (g)(2)(ii)(B) of this section; and

(iii) The notice must be signed by the commodity pool operator in accordance with paragraph (h) of this section.

(D)(1) Each unaudited Annual Report for which the relief available under paragraph (g)(2)(ii) of this section has been claimed must prominently disclose on the cover page thereof: "Pursuant to an exemption from the Commodity Futures Trading Commission, this unaudited Annual Report covers the period from the date of formation of the pool to the end of the pool's first fiscal year, a period of [number] months."

(2) The next Annual Report for the pool must prominently disclose on the cover page thereof: “Pursuant to an exemption from the Commodity Futures Trading Commission, this audited Annual Report covers the period from the date of formation of the pool to the end of the pool’s first 12-month fiscal year, a period of [number] months.”

(E) The commodity pool operator must maintain in accordance with § 4.23 of this chapter each waiver it has obtained to claim the relief available under paragraph (g)(2)(ii) of this section.

* * * * *

Issued in Washington, DC, on July 29, 2016, by the Commission.

Christopher J. Kirkpatrick,
Secretary of the Commission.

NOTE: The following appendix will not appear in the Code of Federal Regulations.

**Appendix to Commodity Pool Operator Annual Report – Commission Voting
Summary**

On this matter, Chairman Massad and Commissioners Bowen and Giancarlo voted in the affirmative. No Commissioner voted in the negative.

[FR Doc. 2016-18400 Filed: 8/4/2016 8:45 am; Publication Date: 8/5/2016]